BEFORE THE WEST VIRGINIA OFFICE OF TAX APPEALS

REDACTED DECISION – DK# 15-093 RP-C

BY: HEATHER G. HARLAN, CHIEF ADMINISTRATIVE LAW JUDGE
SUBMITTED FOR DECISION ON FEBRUARY 16, 2016
ISSUED ON AUGUST 15, 2016

SYNOPSIS AND CONCLUSIONS OF LAW

TAXATION
SUPERVISION
GENERAL DUTIES AND POWERS OF COMMISSIONER; APPRAISERS

It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. *See* W. Va. Code Ann. § 11-1-2.

TAXATION; WEST VIRGINIA TAX PROCEDURE AND ADMINISTRATION ACT; COLLECTION OF TAX

"The Tax Commissioner shall collect the taxes, additions to tax, penalties and interest imposed by this article or any of the other articles of this chapter to which this article is applicable." W. Va. Code Ann. § 11-10-11(a).

TAXATION; CASE LAW; WEST VIRGINIA SUPREME COURT OF APPEALS

"The same standard set out in the State Administrative Procedures Act, W.Va. Code, 29A-1-1, *et seq.*, is the standard of review applicable to review of the Tax Commissioner's decisions under W.Va. Code, 11-10-10(e) (1986)." *Preston Memorial Hosp. v. Palmer, 2003*, 578 S.E.2d 383, 213 W.Va. 189 (2003) "An excise tax is hereby levied and imposed on the use in this state of tangible personal property, custom software or taxable services, to be collected and paid as provided in this article or article fifteen-b of this chapter, at the rate of six percent of the purchase price of the property or taxable services, except as otherwise provided in this article." W. Va. Code Ann. § 11-15A-2(a).

TAXATION; CASE LAW; WEST VIRGINIA SUPREME COURT OF APPEALS

The West Virginia Supreme Court of Appeals has upheld as constitutional the placing of the burden of proof on petitioners who challenge actions by a taxing authority. *Bayer MaterialScience, LLC, v. State Tax Com'r.*, 223 W.Va. 38, 672 S.E.2d 174 (2008).

OFFICE OF TAX APPEALS; CASE LAW; WEST VIRGINIA SUPREME COURT OF APPEALS

There is no authority under West Virginia law to require motor carriers to prove how much fuel they used in other states prior to seeking a credit pursuant to West Virginia Code Section 11-15A-10a. Therefore, the Tax Commissioner's insistence on such proof was arbitrary and capricious, an error of law, and clearly wrong.

OFFICE OF TAX APPEALS; CASE LAW; WEST VIRGINIA SUPREME COURT OF APPEALS

It is well-established that one charged with enforcing a statute may not, under the guise of interpretation, modify the plain language of a statute he is obligated to enforce. *See Syncor Intl. Corp. v. Palmer*, 208 W. Va. 658, 542 S.E.2d 479 (2001).

OFFICE OF TAX APPEALS; CASE LAW; WEST VIRGINIA SUPREME COURT OF APPEALS

Within the past decade, the West Virginia Supreme Court of Appeals has reiterated this long standing position, stating that "[a]n examination of that section of the code reveals that the 'language used requires interpretation because of ambiguity which renders it susceptible of two or more construction'" and that the provision is 'of such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning." *Davis Memorial Hospital v. West Virginia State Tax Com'r*, 222 W. Va 688, 671 S.E.2d 682 at 682-83 (2008).

FINAL DECISION

On February 3, 2015, the Taxpayer Services Division of the West Virginia State Tax Department (the "Respondent") issued Letter Id: L1454211392 (the "Denial") to the petitioner herein (the "Petitioner"). The Denial originated because Petitioner reported zero West Virginia Adjusted Gross Income on his 2014 West Virginia Personal Income Tax return, which was calculated by subtracting all income that Petitioner received from his United States National Guard (the "Guard") duties from his federal adjusted gross income (the "Reducing Modification"). The Reducing Modification resulted in a reported refund of $4,084.00 (the "Refund Amount").

Upon review of such return, Respondent issued the Denial, which explained that Petitioner's National Guard pay is fully taxable to the State of West Virginia and, accordingly, his refund was reduced to $1,361.00 (the "Denial Amount"). As grounds for the Denial, the "Summary of Changes", located therein, provides that "[a]ctive duty military pay, including National Fully Taxable to the State of West Virginia, and [g]uardsman and Reservists receiving active duty military pay must provide orders designated by the President of the United States.

Your modification to income to income is denied." (the foregoing grounds shall be collectively sometimes referred to herein as the "Justification."

On March 21, 2015, the Petitioner timely filed a petition for refund with this Tribunal (hereinafter, the "Petition"). Ms. A, Enrolled Agent, serves as Petitioner's designated representative. The Petition seeks a refund in the amount of $3,443.00 (the "Adjusted Refund Amount"), which is the difference between the amount of the refund that Petitioner anticipated receiving before his return was changed by the Respondent and the amount of the refund the Petitioner actually received. An evidentiary hearing was held on October 8, 2015, at the conclusion of which the parties filed legal briefs. The matter became ripe for a decision at the conclusion of the briefing schedule.

FINDINGS OF FACT

1. The Petitioner is an individual residing in a County in West Virginia.

2. The Petitioner is an Officer with the United States National Guard (the "Guard").

3. The Petitioner was on active military orders (the "Orders") during the entirety of the tax period ended 2014 (the "Refund Period").

4. Petitioner's orders were characterized as "Title 32 Orders," meaning that such orders were issued pursuant to 32 USC. § 502(F)(1). According to Petitioner, the Title 32 Orders allow members of the Guard to perform certain operational duties (the "Duties").

5. The Duties include the "Airport Security Mission", whereby individuals, such as Petitioner, who are members of the Guard were assigned to security detail at airports throughout the United States after the attacks of September 11, 2001. In addition to the Airport Security

Mission, Petitioner was also assigned to assist in the relief efforts involved with Hurricanes Katrina and Rita.

DISCUSSION

A. Standard of Review

In issuing decisions as Chief Judge for this Tribunal, the undersigned is mindful of the legal errors that would subject it to reversal on appeal. In this regard, the relevant statute provides:

> (g) The court may affirm the order or decision of the agency or remand the case for further proceedings. It shall reverse, vacate or modify the order or decision of the agency if the substantial rights of the petitioner or petitioners have been prejudiced because the administrative findings, inferences, conclusions, decision or order are:
>
> (1) In violation of constitutional or statutory provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the agency; or
>
> (3) Made upon unlawful procedures; or
>
> (4) Affected by other error of law; or
>
> (5) Clearly wrong in view of the reliable, probative and substantial evidence on the whole record; or
>
> (6) Arbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.

W. Va. Code § 29A-5-4. Importantly, Syllabus Point one of *Griffith v. ConAgra Brands, Inc.*, 229 W.Va. 190, 28 S.E.2d 74 (2012), the West Virginia Supreme Court of Appeals held that:

> In an administrative appeal from the decision of the West Virginia Office of Tax Appeals, this Court will review the final order of the circuit court pursuant to the standards of review in the State Administrative Procedures Act set forth in *W.Va.Code,* 29A–5–4(g) [1988]. Findings of fact of the administrative law judge will not be set aside or vacated unless clearly wrong, and, although administrative interpretation of State tax provisions will be afforded sound consideration, this Court will review questions of law *de novo.*

Further, the West Virginia Supreme Court of Appeals stated that: "[t]he same standard set

out in the State Administrative Procedures Act, W.Va. Code, 29A-1-1, *et seq.*, is the standard of review applicable to review of the Tax Commissioner's decisions under W.Va. Code, 11-10-10(e) (1986)." *Preston Memorial Hosp. v. Palmer, 2003,* 578 S.E.2d 383, 213 W.Va. 189 (2003) (quoting Syl. Pt. 3, in part, *Frymier-Halloran v. Paige,* 193 W.Va. 687, 458 S.E.2d 780 (1995)).

B. Burden of Proof

It is the duty of the Tax Commissioner to see that the laws concerning the assessment and collection of all taxes and levies are faithfully enforced. West Virginia Code § 11-1-2. Here, Petitioner bears the burden of proof in challenging the presumptive correctness of Respondent's action. *See* West Virginia Code § 11-10A-10(e), ("[e]xcept as otherwise provided by this code or legislative rules, the taxpayer or Petitioner has the burden of proof").

The West Virginia Supreme Court of Appeals has upheld as constitutional the placing of this burden on Petitioner. *See Bayer MaterialScience, LLC, v. State Tax Com'r*., 223 W.Va. 38, 672 S.E.2d 174 (2008). Specifically, the Court noted that:

> For its second assignment of error, Bayer complains that it also was denied due process by the onerous burden of proof imposed upon taxpayers challenging allegedly erroneous tax assessments. Bayer first contends that a taxpayer's burden of proof before a Board of Equalization and Review is by a preponderance of the evidence; thus, Bayer argues that requiring it to sustain its claims for relief before the Board by clear and convincing evidence was wrong. Additionally, Bayer asserts that requiring taxpayers to prove by clear and convincing evidence the erroneousness of their tax assessments is unconstitutional because the Tax Commissioner is not held to a corresponding standard. In response, the Tax Commissioner and the Commission reply that a taxpayer challenging the correctness of a tax assessment must prove his/her claim for relief by clear and convincing evidence. Such a standard, which the appellees respond is often used in other types of cases, is not unconstitutional and does not deny appealing taxpayers of due process.
> 56 At the outset, we note that Bayer's assignment of error on this point challenges both its burden of proof, *i.e.*, by clear and convincing evidence, and its burden of persuasion insofar as neither the Tax Commissioner nor the Assessor are required to prove the correctness of their assessments. We have repeatedly recognized, though, that it is customary to require the party seeking relief to carry the burden of

> persuasion: "[i]t is a well-established rule of law that in civil actions the party seeking relief must prove his right thereto." *Boury v. Hamm*, 156 W.Va. 44, 52, 190 S.E.2d 13, 18 (1972). Accordingly, when a plaintiff comes into court in a civil action he must, to justify a verdict in his favor, establish his case .... The burden of proof, meaning the duty to establish the truth of the claim ..., rests upon him from the beginning, and does not shift, as does the duty of presenting all the evidence bearing on the issue as the case progresses.
> *Burk v. Huntington Dev. & Gas Co.*, 133 W.Va. 817, 830, 58 S.E.2d 574, 581 (1950), *modified on other grounds, Foster v. City of Keyser*, 202 W.Va. 1, 501 S.E.2d 165 (1997). *See also Mayhew v. Mayhew*, 205 W.Va. 490, 497 n. 15, 519 S.E.2d 188, 195 n. 15 (1999) (explaining differences between burden of proof and burden of persuasion). In order to sustain its burden of persuasion as to its claims for relief, then, Bayer is required to carry the burden of proof.

With these principles in mind regarding the standard of review and burden of proof, we now discuss the proper legal analysis in this matter.

C. Legal Analysis

1. The Parties' Positions

The Denial was based upon Respondent's interpretation of West Virginia Code Section 11-21-12(e), entitled "Additional modification reducing federal adjusted gross income," and providing that:

> (a) For taxable years beginning after December 31, 2000, in addition to amounts authorized to be subtracted from federal adjusted gross income pursuant to subsection (c), section twelve of this article, active duty military pay received for the period of time an individual is on active duty as a member of the National Guard or armed forces reserve called to active duty pursuant to an Executive Order of the President of the United States for duty in Operation Enduring Freedom or for domestic security duty is an authorized modification reducing federal adjusted gross income, but only to the extent the active duty military pay is included in federal adjusted gross income for the taxable year in which it is received.
>
> (b) For taxable years beginning after December 31, 2012, in addition to amounts authorized to be subtracted from federal adjusted gross income pursuant to subsection (c), section twelve of this article, active duty military pay received by a resident individual who is on active duty for thirty continuous days or more in the

> armed forces of the United States, the National Guard or armed forces reserve is an authorized modification reducing federal adjusted gross income for the taxable year in which the individual has separated from active military service, but only to the extent the active duty military pay is included in federal adjusted gross income for the taxable year in which it is received. *Id.*

The sole issue in this case involves the reasonableness of Respondent's interpretation of West Virginia Code §11-21-12e (the "Subject Statute"). Respondent's Interpretation ostensibly requires that the National Guard or armed forces reserve member's military orders must have been signed by Executive Order issued by the President of the United States in order to receive the reducing modification at issue here.

The Petitioner argues in his brief that "[t]he tax code as written does not delineate between the Title 10 and Title 32 types of active duty military orders, 2. The funding for this specific type of Title 32 effort is completely federal and at no point funded by state money, and 3) . . . Title 10 and Title 32 can be completely interchangeable in support of these types of Homeland Security Missions and have in the recent past." *See* Petitioner's Brief, at *1, Par. 1. To elaborate, the Petitioner, *appearing pro se*, aptly notes that:

> When reviewing the WV tax code, it is vaguely described as to what type of duty is actually authorized the exemption. Since and Executive Order and a Presidential Directive are synonymous and the fact that the inherent mission of the Department of Homeland Security is based in domestic security, it would appear obvious that this mission set and these types of orders would apply to the exemption. If the intent for the qualifier is simply a Title 10 order, perhaps that language should be placed in the code.

For clarification purposes, under Title 32 Orders, the National Guard remains under state control but receives federal reimbursement. Specifically, the record reveals that missions carried out pursuant to Petitioner's Orders are done so pursuant to 32 USC § 502. Petitioner states that his Orders were Title 32 Orders as project manager for the Department of Homeland Security

mission that the National Guard supports and that this program is referred to as a "reimbursable account program," whereby the operational support for the program is federal in nature.

As authority for the Orders, Petitioner cites 32 U.S.C. §502 (f)(1), stating that it permits members of the National Guard to perform certain operational activities, such as the Airport Security Mission. The record demonstrates that the operational expenses, such as military pay and allowances, along with travel funding and certain miscellaneous items, are funded by virtue of an interagency agreement between the Department of Homeland Security and the National Guard Bureau. Once the National Guard Bureau receives funding, the relevant expenditures are deducted from the proper accounts and at no time is any money subtracted from state accounts.

In response, the Tax Commissioner's counsel argues that "[P]etitioner does not claim that he was called into duty for Operation Enduring Freedom. Therefore, in order [to] qualify for this modification, Petitioner would have to have been called into active duty by an Executive Order of the President *for domestic security duty.*" Respondent's Brief, at *3-4. The Subject Statute contains no such requirement and, as explained below, any attempt by Respondent to do so, and for this Tribunal to enforce such interpretation, is a violation of Respondent's authority and constitutes clear error. To elaborate, it is well-established one charged with enforcing a statute may not, under the guise of interpretation, modify the plain language of a statute he is obligated to enforce. *See Syncor Intl. Corp. v. Palmer*, 208 W. Va. 658, 542 S.E.2d 479 (2001). Yet, Respondent urges just that in positing Respondent's Interpretation.

Citing 32 U.S.C. § 328 as a justification for Respondent's Interpretation, Respondent counters that while the President or the Secretary of Defense may request operational support from the National Guard, the National Guard remains under the command and control of the Governor. Respondent states that only the Governor of a State can place a soldier in full-time National Guard

Duty. As support, Respondent quotes a definition of full-time National Guard duty, defined in 10 U.S.C. § 101 as "training or other duty, other than inactive duty, performed by a member of the Army National Guard of the United States . . ." Respondent's Brief at *5, par. 1. Respondent believes, and Petitioner does not seemingly dispute, that his issues were titled under Title 32.

To support its limitation of the Subject Statute, Respondent then argues that the reducing modification under West Virginia Code § 11-21-12(e)(a) specifically requires that the National Guard or Armed Forces Reserve be called into "active duty," not full-time National Guard Duty. To support this assertion, Respondent first quotes the definition of active duty, set forth in Title 32, as "full-time duty in the active military service of the United States. It includes such Federal duty as full-time training duty, annual training duty, and attendance, while in the active military service, at a school designated as a service school by law or by the Secretary of the military department concerned. It does not include National Guard duty." 32 U.S.C. § 101(12).

Having reasoned that anything designated as National Guard duty, which includes duty pursuant to orders under section 502 of Title 32 is not considered "active duty," Respondent then explains that Title 10 allows the President of the United States to federalize the National Guard by ordering them into active service, as is done in cases of a national emergency, see 10 USC 12301; in the case of an insurrection in any State, see 10 USC 331; to enforce laws and to suppress State rebellions, see 10 USC 332; when the State is unable to protect its people from deprivation of Constitutional Rights, see 10 USC 333; when the United States is in danger of invasion by a foreign nation or when the President is unable with regular armed forces to execute the laws of the United States." 10 USC 12406.

To bolster Respondent's Interpretation, Respondent attempts to further distinguish Title 10 orders from Title 32 orders by citing *Gilbert v. United States*, 165 F.3d 470 (6th Cir. 1999) for

the proposition that Orders to the National Guard are issued pursuant to Title 32 and, therefore, are state orders not subject to the *Posse Comitatus* Act. This act, which was designed to prevent use of the federal army to aid civil authorities in the enforcement of civilian laws," does not apply to the National Guard unless they have been called into "federal service." Further explaining, Gilbert held that:

> Notwithstanding this proof of the Guardmen's status, appellants contend that, because the Guardsman were serving in a full-time capacity and were being compensated with federal, rather than state, funds, they were in "federal service," and acting as members of the United States Army. "These circumstances are immaterial: the issue of status depends on command and control and not on whether state or federal benefits apply; state or federal funds are being used: the authority for the duty lies in state or federal law; or any combination thereof. Although National Guard members receive federal pay and allowances . . . while performing full-time National Guard Duty, they remain members of the state National Guard and not members on active duty in federal service with the United States Army." Consequently, the Act, which applies only to members of the federal armed services, does not apply to the Guardsmen in this case. *Id. at 473.*

To summarize, Respondent reasons that, even though the Subject Statute fails to explicitly mention Title 10 or Title 32, this Tribunal should nevertheless construe it as limiting the reducing modification to only those individuals who a) participated in Operation Enduring Freedom or b) who are, pursuant to Title 10, "federalized" and specifically called into duty by the President of the United States. In addition to reading entire sections from the United States Code into the Subject Statute, Respondent would then have this Tribunal read into the Subject Statute a requirement that the military orders must be signed by the President of the United States.

This new requirement is justified, reasons Respondent, because since the Subject Statute explicitly mentions Operation Enduring Freedom and since that operation, as a declaration of war in response to 9/11, was almost assuredly issued by an Executive Order issued by the President of

the United States, the Subject Statute requires that all military orders, other than Title 10 Orders, be issued pursuant to Executive Order signed by the President of the United States. The previous two paragraphs shall be referred to herein as the "Limiting Language"). Title 32 orders, do not qualify for the decreasing modification in the Subject Statute.

Having determined then that Title 32 orders are inapplicable, Respondent, partly relying upon *Gilbert,* argues that, although undefined, the Limiting Language should be read into the Subject Statute. The Respondent exceeded his authority in this impermissible statutory construction. Thus, Petitioner is entitled to the relief requested in the Petition.

2. Principles of Statutory Construction

As set forth herein, there is generally a presumption of correctness of the administrative action being challenged in matters such as the issue at hand and such, the burden of persuasion is placed upon the party raising that challenge. *See* **Cleckley**, *Handbook on Evidence for West Virginia Lawyers 4th Ed.,* Vol. II, §§12-1, et seq. Indeed, West Virginia Code 11-10A-10(e) states as much. This burden, however, is satisfied when, as here, the party challenging an administrative action has come forward with prima facie evidence "showing cause" why that action is in error. Petitioner, who appeared *pro se*, persuasively argues essentially that the Subject Statute is clear. In cases involving judicial review of the construction given a statute by an executive agency charged with administering that statute, the first question for the reviewing court is whether the statute is clear enough to preclude the need for construction. *Appalachian Power Co. v. State Tax Dep't, Syl Pt. 3,* 195 W. Va. 573, 466 S.E. 2d 424 (1995). Within the past decade, the West Virginia Supreme Court of Appeals has reiterated this long standing position, stating that "[a]n examination of that section of the code reveals that the "language used requires interpretation because of ambiguity which renders it susceptible of two or more constructions" and that the provision is "of

such doubtful or obscure meaning that reasonable minds might be uncertain or disagree as to its meaning*."* *Davis Memorial Hospital v. West Virginia State Tax Com'r*, 222 W. Va 688, 671 S.E.2d 682 at 682-83 (2008). Although the Subject Statute appears to this Tribunal to be written in a clear and unambiguous manner, it nevertheless engages in the statutory construction analysis below, inasmuch as neither party argued the ambiguity of the Subject Statute.

If the Subject Statute is silent or ambiguous with respect to the specific issue, the issue for the court is whether the agency's answer is based on a permissible construction of the statute. *Appalachian Power Co. v. State Tax Dep't, Syl Pt. 4*, 195 W. Va. 573, 466 S.E. 2d 424 (1995.)

In the execution and enforcement of statutes enacted by the Legislature, administrative agencies and the courts are bound to follow the express language of those laws. *Appalachian Power, supra.* Only if the meaning of those words is not apparent on their face, or if the words do not address questions that they inherently present, are administrative agencies and the courts authorized to engage in construction of that language to determine the Legislature's intent. *Id.*

It is axiomatic that legal consequences should not be based on an incorrect interpretation of the applicable law. *See WV Health Care Cost Review Authority v. Boone Memorial Hosp.,* 196 W. Va. 326, 335, 472 S E.2d 420 (1996). In such circumstances or when the Respondent's interpretation of a tax statute exceeds his statutory authority, this Tribunal is not generally justified upholding Respondent's actions.

Without engaging in his own statutory analysis, including an examination of legislative history and intent, Respondent here, by way of Respondent's Interpretation, reads the Limiting Language into the Subject Statute. Such actions are viewed with disapproval because:

The practice of reading words into a statute is one to be exercised with caution, and should only

> be indulged when an omission is palpable and the omitted word clearly indicated by the context. Where the omission is not plainly indicated and the statute as written is not incongruous or unintelligible and leads to no absurd results, the court is not justified in making an interpolation. It is safer in a case which admits of doubt, when the court finds itself at all involved in conjecture as to what was the legislative intent, that the particular object which may reasonably be supposed to have influenced the legislature in the particular case should fail of consummation than that the courts should too readily yield to a supposed necessity, and exercise a power so delicate, and so easily abused, as that of adding to or taking from the words of the statute.

Lewis v. Musgrove, 80 W. Va. 714, at 717-718, 93 S.E. 820, at 821 (1917) (internal quotations and citations omitted).

By successfully rebutting the presumption of correctness that Responding enjoys as long as a statute is reasonably construed, Petitioner has met his burden of proof. Further, a review of the entire record, including any and all applicable case law, leads this Court to conclude that Respondent exceeded his authority by relying upon an erroneous interpretation of the governing statute. Failure of this Tribunal to reverse his actions in this circumstance could constitute reversible error and so accordingly, he cannot and must not prevail here.

DISPOSITION

WHEREFORE, it is the final decision of the West Virginia Office of Tax Appeals that the Petitioner's petition for refund is **GRANTED** because Respondent exceeded his authority in his erroneous application of the Subject Statute. Petitioner is due the Adjusted Refund, as defined herein for the period of question herein**. IT IS SO ORDERED.**

WEST VIRGINIA OFFICE OF TAX APPEALS

By: _____

Heather G. Harlan
Chief Administrative Law Judge

Date Entered_____